

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

THE CITY OF URBANA, THE CITY OF)
CHAMPAIGN, and the COUNTY OF)
CHAMPAIGN, ILLINOIS, all Municipal)
Corporations, bodies politic and corporate, in)
Champaign County, Illinois,)
Joint Petitioners,)

v.)

Docket No. T11-0134

ILLINOIS CENTRAL RAILROAD COMPANY,)
and the ILLINOIS DEPARTMENT OF)
TRANSPORTATION,)
Respondents.)

Joint Petition for an Order of the Illinois Commerce)
Commission regarding a separation of grades and)
an authorization for the construction of a highway)
bridge over the Illinois Central Railroad Company)
railroad tracks (MP 124.70) at the tracks')
intersection with the Olympian Drive Extension in)
Champaign County, Illinois, an apportionment of)
costs thereof, including directing payment to be)
borne by the Grade Crossing Protection Fund, and)
other stated or requested relief.)

**MOTION TO EXCLUDE INTERVENOR'S "BRIDGE TO NOWHERE" DOCUMENT
AND CONTROLLED EXPERT WITNESS TESTIMONY AND OPINIONS**

The Joint Petitioners, by their Attorney Jon K. Ellis, move the Administrative Law Judge to enter an Order to exclude from evidence the Intervenor's "Bridge to Nowhere: The Proposed Extension of Olympian Drive in Champaign County" and the testimony and opinions of Intervenor's Controlled Expert Witness David Wilson, Ph.D. related thereto, and in support thereof state as follows:

BACKGROUND

1. The Joint Petition seeks Commission approval for the Joint Petitioners to construct a bridge over Illinois Central Railroad Company railroad tracks at Champaign County Railroad Milepost 124.70.

2. A Petition to Intervene was filed in this Matter on October 25, 2011 on behalf of 27 land owners and residents identifying themselves as an organization named “Preserve Olympian Farmland” (hereinafter “the Intervenor”) stating they “vehemently oppose” the construction of this bridge.

3. A Pre-Hearing Brief filed by the Joint Petitioners contains legal citations showing that the Commission’s exclusive and limited jurisdiction in this Matter extends only from “bridge touchdown to touchdown.”

4. Section 18c-7401 of the Illinois Commercial Transportation Law (625 ILCS 5/18c-7401) provides in part that “[t]he Commission shall also have power, after a hearing ... to require a separation of grades at any proposed crossing where a proposed public highway may cross the tracks of any rail carrier ... and to prescribe, after a hearing of the parties, the terms upon which such separations shall be made”

5. On September 28, 2012, the Intervenor identified David Wilson, Ph.D., as a Controlled Expert Witness pursuant to Supreme Court Rule 213(f)(3) in this Matter. In addition, the Intervenor thereafter filed a document titled “Bridge to Nowhere: The Proposed Extension of Olympian Drive in Champaign County” that was co-authored by David Wilson.

6. On April 10, 2013, the Intervenor offered information as to the subject matter as to which David Wilson will testify, his conclusions and opinions, and the bases therefor, all as contained in this “Bridge to Nowhere” document.

7. On May 3, 2013, the Intervenor’s answers to Interrogatories indicate that no part of the Intervenor’s Report was authored solely by David Wilson but rather the Report was authored entirely in collaboration with Matthew Anderson, Ph.D. and individual members of the Intervenor’s organization.

**MOTION TO EXCLUDE INTERVENOR’S “BRIDGE TO NOWHERE” DOCUMENT
AND CONTROLLED EXPERT WITNESS TESTIMONY AND OPINIONS**

The Joint Petitioners move the Administrative Law Judge to exclude from evidence the Intervenor’s “Bridge to Nowhere” and all related documents, testimony, opinions or argument.

The Intervenor’s Rule 213 Disclosure provides in part that the Intervenor’s Controlled Expert Witness David Wilson will testify and offer opinions to:

Project A, including an analysis of the projected benefits of the bridge; the proposed Olympian Drive Bridge: safety, traffic flow, and construction issues; economic development and industrial growth: long-term goals of Project A; industrial growth in Champaign-Urbana, the prospects; sprawl, sustainable development, and Olympian Drive.

This Motion is based upon the grounds that the “Bridge to Nowhere” and David Wilson’s opinions are speculative, hypothetical, not relevant, immaterial, misleading, unreliable, prejudicial, and confusing and are an attempt to mislead the Commission into considering matters beyond the Commission’s exclusive and limited jurisdiction of rail safety in this Matter.

The Joint Petitioners further move the Administrative Law Judge to exclude the testimony and opinions of David Wilson on the grounds that: (i) he is not an engineer and therefore cannot be qualified as an expert witness to testify and offer an opinion as to the terms upon which the bridge separation of railroad tracks will be made; (ii) any testimony and opinions given may constitute violations of the State’s engineer licensing Act; (iii) any other testimony or opinion of David Wilson is not relevant and immaterial as to the Commission’s exclusive and limited jurisdiction of rail safety; (iv) his testimony and opinions are based upon the unidentified and unsubstantiated opinions of others; and (v) he and the Intervenor lack standing to challenge any Commission authorization or allocation of use of the Grade Crossing Protection Fund in this Matter (see specifically Lyons v. Ryan, 201 Ill.2d 529, 780 N.E.2d. 1098, 269 Ill.Dec. 374 (2002); Barber v. The City of Springfield, 406 Ill.App.3d 1099, 943 N.E.2d 1157, 348 Ill.Dec.

247 (4th Dist. 2011); and Citizens for Preservation of Knox County, Inc. v. Illinois Department of Mines and Minerals, 149 Ill.App.3d. 261, 500 N.E.2d 75, 102 Ill.Dec. 453 (3rd Dist. 1986).

This Motion is made under the provisions of Illinois case law, and it is based on the supporting Memorandum of Points and Authorities, the pleadings and papers on file in this Matter, and the arguments and admitted evidence at the hearing of this Matter.

WHEREFORE, the Joint Petitioners move for an Order excluding from evidence the Intervenor's document "Bridge to Nowhere: The Proposed Extension of Olympian Drive in Champaign County" and the testimony and opinions of the Intervenor's Controlled Expert Witness David Wilson, and request all other relief deemed just and proper.

Respectfully submitted,

The City of Urbana, The City of Champaign,
and the County of Champaign, Illinois, Joint
Petitioners

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO EXCLUDE INTERVENOR'S DOCUMENT AND
CONTROLLED EXPERT WITNESS TESTIMONY AND OPINIONS**

The Intervenor's Rule 213 Disclosure states in part that David Wilson, Ph.D. will testify to:

Project A, including an analysis of the projected benefits of the bridge; the proposed Olympian Drive Bridge: safety, traffic flow, and construction issues; economic development and industrial growth: long-term goals of Project A; industrial growth in Champaign-Urbana, the prospects; sprawl, sustainable development, and Olympian Drive.

(ii) Conclusions and opinions of the witness and the bases therefor: Conclusion: The Olympian Drive Bridge will be a very expensive "bridge to nowhere" which offers little or no benefits to the community-whether conceived specifically on rail safety concerns or on a broader economic development agenda. Bases therefor: The bridge would only offer such benefits to Champaign County when the entire project is completed (which may now never happen, and certainly not within decades), and only if the assumed projections of development are realized (and

these projections, we will argue, are based on no concrete evidence or plausible planning scenarios). The report of Dr. Wilson demonstrates that the purpose of the bridge is still based on the projected development of the entire project, with the assumption (and hope) that Plans B and X are revived at a later date and that substantial commercial and industrial development is likely in this current rural areas.

1. INTERVENOR’S “BRIDGE TO NOWHERE” AND EXPERT WITNESS TESTIMONY AND OPINIONS ARE NOT RELEVANT AND SHOULD BE EXCLUDED

This Commission has authority to exclude evidence that is not relevant. Federal Rule of Evidence 401 defines relevancy as follows:

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Illinois has adopted this definition of relevancy through case law. People v. Monroe, 66 Ill.2d 317, 321-22, 5 Ill.Dec. 824, 362 N.E.2d 295 (1977); Spencer v. Wandolowski, 264 Ill.App. 3d 611, 617, 201 Ill.Dec. 422, 636 N.E.2d 854 (1st Dist. 1994).

Illinois case law provides that evidence may be properly excluded where it is not relevant to matters at issue. See Preston ex rel. Preston v. Simmons, 321 Ill.App.3d 789, 803, 254 Ill. Dec. 647, 747 N.E.2d 1059 (1st Dist. 2001) (trial judge should not permit such wide latitude on cross-examination that it undermines the rule that only relevant evidence is admissible); Vojas v. Kmart Corp., 312 Ill.App.3d 544, 552, 245 Ill.Dec. 144, 727 N.E.2d 397 (5th Dist. 2000) (the burden of establishing relevance is on the party offering the evidence); Cochran v. Great Atlantic & Pacific Tea Co., Inc., 203 Ill.App.3d 935, 937-38, 148 Ill.Dec. 923, 561 N.E.2d 229 (5th Dist. 1990) (trial judge has inherent power to exclude irrelevant evidence); Pagel v. Yates, 128 Ill.App.3d 897, 903, 84 Ill. Dec.180, 471 N.E.2d 946 (4th Dist. 1984) (exclusion of irrelevant and confusing document); and Benson v. Bradford Mut. Fire Ins. Corp., 121 Ill.App.3d 500, 510, 76 Ill.Dec. 774, 459 N.E.2d 689, 47 A.L.R. 4th 759 (2nd Dist. 1984) (trial judge has discretion to exclude irrelevant witness testimony).

The Intervenor’s “Bridge to Nowhere” and the testimony and opinions of David Wilson are not relevant to issues under the Commission’s jurisdiction in this Matter and should be excluded.

2. THE COMMISSION MAY EXCLUDE AN EXPERT’S OPINION WHERE BASED UPON SPECULATION OR CONJECTURE

Based upon its Rule 213 Disclosure, the Intervenor seeks to introduce as evidence testimony and documents of others to support its contention that this bridge should never be built. That testimony and those documents are based upon speculation and conjecture. An expert may not base his or her opinion on speculation or conjecture. Schuler v. Mid-Central

Cardiology, 313 Ill.App.3d 326, 334-36, 246 Ill.Dec. 163, 729 N.E.2d 536 (4th Dist. 2000) (trial judge has discretion to exclude expert testimony that is based upon unsupported and speculative facts); People v. Britz, 123 Ill.2d 446, 457-62, 124 Ill.Dec. 15, 528 N.E.2d 703 (1988) (exclusion of expert testimony when the expert's opinion was based upon a party's own self-serving statements); Department of Transportation v. Bouy, 69 Ill.App.3d 29, 33-38, 25 Ill.Dec 499, 386 N.E.2d 1163 (4th Dist. 1979) (expert's testimony is properly excluded when it is based upon a speculative and conjectural method of proof).

3. THE COMMISSION MAY EXCLUDE ALTERNATE USE OF MONEYS FROM THE GRADE CROSSING PROTECTION FUND AS IMPROPER SPECULATION

The Intervenor is attempting to provide opinion evidence of an alternate use of moneys from the Grade Crossing Protection Fund without standing or sufficient foundation. The Intervenor should be barred from offering opinion evidence of any alternate use because there is no evidence that it represents anything more than pure speculation. Without the proper foundation to establish the reliability and accuracy of alternate use, the Joint Petitioners contend that it represents pure speculation that must be excluded.

It is improper to provide an opinion to the jury that is based upon speculation or conjecture. See Schuler v. Mid-Central Radiology, 313 Ill.App.3d 326, 334-36, 246 Ill.Dec. 163, 729 N.E.2d 536 (4th Dist. 2000) (trial judge has discretion to exclude testimony that is based upon unsupported and speculative facts); Department of Transportation v. Bouy, Ill.App.3d 29, 33-38, 25 Ill.Dec. 499, 386 N.E.2d 1163 (4th Dist. 1979) (expert's testimony is properly excluded when it is used upon a speculative and conjectural method of proof). In fact, the Illinois Supreme Court has stated that "garbage" in will lead to "garbage" coming out. Grand Liquor Company, Inc. v. Department of Revenue, 67 Ill.2d 195, 198-203, 367 N.E.2d 1238, 10 Ill.Dec. 472 (1977).

It is true that Illinois law allows an expert to rely on reports of others, if the reports that are relied upon by the expert are generally accepted and relied upon in the expert's field. Bachman v. General Motors Corp., 332 Ill.App.3d 760, 778-80, 776 N.E.2d 262, 267 Ill.Dec. 125 (4th Dist. 2002); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). However, if there is insufficient proof that the expert's methodology is generally accepted, then the opinion that was generated as a result of that methodology should not be admitted into evidence. People v. Acri, 277 Ill.App.3d 1030, 1032-34, 662 N.E.2d 115, 214 Ill.Dec. 761 (3rd Dist. 1996). Moreover, an expert should not be permitted to merely read from another expert's report. Mehochko v. Gold Seal Co., 66 Ill.App.2d 54, 57-59, 213 N.E.2d 581 (5th Dist. 1966). In addition, an expert cannot merely repeat hearsay statements made by another expert. People v. Swanson, 335 Ill.App.3d 117, 125-26, 780 N.E.2d 342, 269 Ill.Dec. 157 (2nd Dist. 2002).

The Intervenor and its Controlled Expert Witness have no standing to question the Commission's approval of the expenditure of moneys from the Grade Crossing Protection Fund. Those moneys are appropriated by the General Assembly and then approved for expenditure by the Illinois Department of Transportation and the Commission. (35 ILCS 505/8(c)). The Intervenor has shown no basis upon which it has standing to question the Constitutional authority of the General Assembly to make appropriations or the statutory discretion of the Illinois

Department of Transportation and the Commission. Moreover, the expenditure of those moneys is not at issue under the Commission's jurisdiction as it relates to this Matter.

4. THE COMMISSION MUST EXCLUDE THE INTERVENOR'S "BRIDGE TO NOWHERE" AND EXPERT WITNESS OPINIONS AS PREJUDICIAL

This Commission has the inherent power to grant a motion to exclude any kind of evidence that could be objected to at hearing, either as not relevant or because it is more prejudicial than probative. Swick v. Liautaud, 169 Ill.2d 504, 520-21, 215 Ill.Dec. 98, 662 N.E.2d 1238 (1996); People v. Watkins, 220 Ill.App.3d 201, 163 Ill.Dec. 194, 581 N.E.2d 145 (1st Dist. 1991); Cochran v. Great Atlantic & Pacific Tea Co., Inc., 203 Ill.App.3d 935, 938, 148 Ill.Dec. 923, 561 N.E.2d 229 (5th Dist. 1990); and Department of Public Works and Bldgs. v. Roehrig, 45 Ill.App.3d 189, 194-95, 3 Ill.Dec. 893, 359 N.E.2d 752 (5th Dist. 1976).

The law is clear that the Commission has the authority to exclude evidence if there is a substantial danger that the probative value will be outweighed by the danger of undue prejudice. Federal Rule of Evidence 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Although this rule has not been specifically codified in Illinois, case law has stated that Illinois has a common-law rule that is comparable to Federal Rule of Evidence 403. See People v. Peete, 318 Ill.App.3d 961, 966-67, 252 Ill.Dec. 821, 743 N.E.2d 689 (4th Dist. 2001); People v. Walker, 335 Ill.App.3d 102, 112, 268 Ill.Dec. 654, 779 N.E.2d 268 (2nd Dist. 2002).

In addition, Illinois cases have specifically held that evidence should be excluded when the prejudicial impact of the evidence outweighs its probative value. Department of Public Works and Buildings v. Roehrig, 45 Ill.App.3d 189, 196, 3 Ill.Dec. 893, 359 N.E.2d 752 (5th Dist. 1976) (exclusion of evidence of prior condemnations in a condemnation case because the prejudicial impact outweighs the probative value); People v. Holman, 257 Ill.App.3d 1031, 1033-34, 196 Ill.Dec. 457, 630 N.E.2d 154 (2nd Dist. 1994) (evidence is admissible if it is relevant and if the prejudicial impact does not substantially outweigh the probative value).

In this Matter, the admission of the Intervenor's "Bridge to Nowhere" and the expert witness's opinions have the potential to create undue prejudice by confusing and misleading the Commission as to its exclusive and limited jurisdiction of rail safety. Therefore, the "Bridge to Nowhere" and the expert's opinions should be excluded.

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Joint Petition for an Order of the Illinois Commerce Commission regarding a separation of grades and an authorization for the construction of a highway bridge over the Illinois Central Railroad Company railroad tracks (MP 124.70) at the tracks' intersection with the Olympian Drive Extension in Champaign County, Illinois, an apportionment of costs thereof, including directing payment to be borne by the Grade Crossing Protection Fund, and other stated or requested relief.

NOTICE OF FILING

TO ALL PARTIES OF RECORD:

PLEASE TAKE NOTICE that the Joint Petitioners have filed a Motion to Exclude Intervenor's "Bridge to Nowhere" Document and Controlled Expert Witness Testimony and Opinions in the above-captioned Matter with the Illinois Commerce Commission on May 10, 2013. A copy of the aforementioned Motion has been e-mailed to each of the individuals listed on the attached Certificate of Service.

Respectfully submitted,

The City of Urbana, The City of Champaign,
and the County of Champaign, Illinois, Joint
Petitioners

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing Motion to Exclude Intervenor's "Bridge to Nowhere" Document and Controlled Expert Witness Testimony and Opinions was made, in addition to electronic filing with the Illinois Commerce Commission, by e-mailing a true and accurate copy thereof to:

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to each of their respective e-mail addresses listed above, on May 10, 2013.

/s/ Jon K. Ellis
Jon K. Ellis